United Nations A/C.6/55/SR.21

General Assembly
Fifty-fifth session
Official Records

Distr.: General
14 November 2000

Original: English

Sixth Committee

Summary record of the 21st meeting
Held at Headquarters, New York, on Wednesday, 1 November 2000, at 10 a.m.

Chairman: Mr. Politi ..... (Italy)

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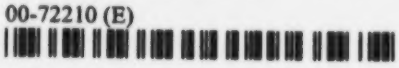

The meeting was called to order at 10.15 a.m.

Agenda item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Jacovides** (Cyprus), speaking on chapter V of the report, recalled that in 1960, as a graduate student, he had worked at Harvard Law School on the question of "the right of a State to compromise, waive or settle claims of its nationals", which was then already a developed area of international law, in terms of both customary and treaty law. He had the impression that it had not altered much since that time. He agreed with the basic thesis of the nine draft articles on diplomatic protection presented by the Special Rapporteur, namely that despite the emergence of various dispute settlement mechanisms to which individuals had been given access, diplomatic protection remained an important tool for their protection in the international arena. He also sympathized with the Special Rapporteur's desire to treat it as a means of promoting human rights. The approach adopted in draft article 1, that diplomatic protection was the right of the individual, was in keeping with progressive thinking on the matter.

2. However, the prevalent view was that it was the discretionary right of the State to espouse and present a claim to another State based on its wrongful act. States were under no obligation to do so, although such an obligation might in some cases exist in constitutional law. Draft article 2 raised the issue of whether forcible intervention was permitted in international law to protect nationals. That issue fell within the broader topic of State responsibility. The use of force to protect nationals abroad should not be considered in isolation from the relevant provisions of the Charter of the United Nations and of *jus cogens*.

3. Draft article 3 raised the issue of whose right was being asserted when the State of nationality invoked the responsibility of another State for injury caused to its nationals. It should be recognized that diplomatic protection was a right attaching to the State, which it could exercise at its own discretion. In practice, a State would probably refrain from exercising its right when the person affected had an individual remedy. Alternatively, it might join with the individual in exercising his or her right under the relevant treaty, as had happened on several occasions in the jurisdiction of the Council of Europe. The approach adopted in draft article 3 reflected the traditional view, derived from the *Mavrommatis Palestine Concessions* case, in which the Permanent Court of International Justice had held that diplomatic protection was the right of the State, which did not act as the agent of the injured national. The Special Rapporteur's proposition, as reflected in draft article 4, that the provision in some States' constitutions establishing a right to diplomatic protection should be reflected in international law, was not supported by State practice. With regard to draft article 5, the current position was that of the International Court of Justice in the *Nottebohm* case. The nationality requirement was linked with the requirements of denial of justice and the exhaustion of local remedies.

4. His delegation maintained an open mind on the issues raised in draft articles 6, 7 and 8 with regard to multiple and dominant nationality and stateless persons and refugees. The Commission could make a real contribution by developing the rules on those points in line with progressive contemporary views, beyond the traditional rules of customary law.

5. Turning to the topic of unilateral acts of States, covered in chapter VI of the report, he welcomed the substantial progress made on a topic which represented hitherto uncharted terrain, covering a great variety of unilateral acts in the practice of States. He could support the reformulations of draft articles 1 to 7 submitted by the Special Rapporteur, including the definition of unilateral acts in draft article 1. He had an open mind on whether estoppel could be included in the category of unilateral acts. He supported the proposals of the Working Group for further work on the topic.

6. On chapter VII of the report, dealing with reservations to treaties, he believed that the relevant provisions of the Vienna Convention on the Law of Treaties set down the basic rules on the subject. However, because of the developments which had taken place since then it would be useful to develop a guide to State practice in that field. In chapter VIII, on international liability for injurious consequences arising out of acts not prohibited by international law, he welcomed the emphasis placed on prevention, which was especially significant in international environmental law.

7. **Mr. Hmoud** (Jordan) said that in view of the conflicting views which had emerged on the topic of

diplomatic protection, such as the nature of the institution and its consequences, and its relationship with the right of States to grant nationality, it was crucial that States should offer the Commission guidelines for its work. The definition of diplomatic protection should clarify whether the injured person was a natural or legal person, or both. He believed it should extend to legal persons, because the decision in the *Barcelona Traction* case had made clear that it could. In exceptional circumstances, it could also be extended to non-nationals. Refugees and stateless persons did not enjoy sufficient international protection under existing law. A refugee whose property was illegally confiscated in a State other than the State of asylum had no international remedy, nor did a stateless person who suffered torture in a State other than the State of residence. States should be entitled to exercise diplomatic protection in favour of refugees or stateless persons who were legally resident in them. In such cases, residence could be deemed to show an effective link between the non-national and the State. The use of force as an exceptional means of diplomatic protection would contravene the requirement in the Charter of the United Nations that States should refrain in their mutual relations from the threat or use of force. In the past, the doctrine of diplomatic protection had been abused as a pretext for attacking other States, toppling regimes and jeopardizing the territorial integrity and political independence of weaker States. The Commission's draft articles on State responsibility prohibited the use of force by way of countermeasures, and it would be inconsistent to allow it in the case of diplomatic protection.

8. With regard to draft articles 3 and 4, he supported the view that diplomatic protection was a right of the State, not of the individual. A State should not be subject to the will of the injured person in exercising it, even in the case of a grave breach of *jus cogens* rules of human rights law. If it became an obligation for States to exercise diplomatic protection, the exemption in paragraph 2 (a) of draft article 4 would compel a weak State to disclose the reasons for not exercising it, thereby revealing information perhaps of a crucial nature, failing which it could be internationally condemned for committing a wrongful act. Progressive development of the law should not entail imposing an internal law obligation on a State in the conduct of its international relations.

9. On the question of nationality, he drew a distinction between the absolute right of States to confer their nationality on individuals, and the issue of nationality for the purpose of diplomatic protection. For the latter purpose, according to *opinio juris*, birth and descent constituted sufficient links between the State and the individual. In the case of naturalization, the issue was not so clear. According to the decision in the *Nottebohm* case, however, if a State other than the State of naturalization exercised the right to invoke diplomatic protection, the latter State would have to prove the existence of an effective link. In the case of dual or multiple nationality, he supported the idea of joint exercise of diplomatic protection, provided the States concerned did in fact act jointly, thus avoiding the risk of diluting their common rights.

10. It would be preferable to delete draft article 6. The decisions of the Iran-United States Claims Tribunal and the United Nations Compensation Commission did not provide sufficient proof that according to customary law, a State could exercise diplomatic protection on behalf of an injured national against another State of which that individual was also a national. It would only encourage "nationality shopping" or "forum shopping" if individuals lacking access to due process in their countries of origin were able to seek diplomatic protection through the nationality of another State.

11. **Mr. Rogachev** (Russian Federation), referring to the topic of unilateral acts of States, said that the legal norms governing such acts were not yet fully clear, which made codification difficult. There was a great variety of such acts, and differing points of view on whether certain acts of States could be classified as unilateral acts or not. The Special Rapporteur had endeavoured to formulate some draft articles, beginning with the codification of general principles relating to all unilateral acts. He agreed with the predominant view in the Working Group which favoured a preliminary survey of State practice in that field. The best course was to define the category of acts of States which could be classified as unilateral, and then to ascertain the legal character of each act.

12. Concerning the definition of unilateral acts, he supported the removal of the criterion of "publicity" and of the concept of "multilateral" unilateral acts, and the replacement of "acquiring international legal obligations" by "producing legal effects". However, the new definition was not entirely flawless. It would be

useful to include in it a provision that a unilateral act was performed with the intention of producing legal effects under international law, thus confirming that there was a link between such acts and international law. After all, the legal significance of the act and its binding force had to be decided according to international law, specifically the principle of good faith. The question of estoppel could not be left out, because it was closely connected with unilateral acts, although the connection had mainly to do with its consequences.

13. The inclusion of draft article 5, on the invalidity of unilateral acts, was a step in the right direction. However, it appeared from the text of the article and from the report itself that a unilateral act could deviate from a dispositive rule of international law. Such an act could be lawful only if it was an act preliminary to the conclusion of a treaty. Draft article 5 should perhaps make clear that such a unilateral act could not have legal force until it was accepted by another State.

14. He concluded by saying that the fundamentals of the topic were still being worked out, and there was a great deal of work yet to be done.

15. **Mr. Al-Baharna** (Bahrain), commenting on the topic of diplomatic protection, said that the term "action" in draft article 1 was not appropriate. Diplomatic protection should be defined as the peaceful exercise by a State of its right to afford protection to a national. There should be no suggestion that force could be used; the conduct of a State in exercising its right must comply with the principles of international law. For the purpose of claiming protection, the national concerned must have acquired the nationality of the State in question by birth, descent or bona fide naturalization. The principle in article 1 of the 1930 Hague Convention that it was for each State to determine under its own law who were its nationals created a strong presumption that the nationality so determined would be acknowledged for international purposes. In granting nationality, States had to comply with international standards that were sometimes linked to the requirements of human rights protection. The Special Rapporteur, in paragraph 102 of his report (A/CN.4/506), confirmed that birth and descent were recognized by international law as a satisfactory connecting factor for the conferment of nationality. The question arose, with reference to the *Nottebohm* case, whether naturalized individuals had to have an additional "genuine" or "effective" link with the State of naturalization, even where they did not have a second nationality. However, that requirement could be restricted to the special facts of the *Nottebohm* case; it should not be treated as a general principle of international law, applicable without distinction to any and every case of diplomatic protection. He therefore agreed with the view of the Special Rapporteur, expressed in paragraph 111, that the principle of an effective and genuine link should not be seen as a rule of customary international law in cases not involving dual or plural nationality. In the *Flegenheimer* case, the Italian-United States Conciliation Commission had found that where a person was vested with only one nationality, the theory of effective nationality could not be applied without the risk of causing confusion. He therefore agreed with the Commission that it was doubtful whether the International Court of Justice, in the *Nottebohm* case, had intended to establish a rule of general international law.

16. On the question of dual nationality, article 3 of the 1930 Hague Convention laid down that a person with two or more nationalities could be regarded as its national by each of the States whose nationality he possessed. Many States prohibited their nationals from holding the nationality of another State. However, to reduce the conflict arising from dual nationality in the event of diplomatic protection, he felt the draft articles should incorporate the principle in article 4 of the Hague Convention to the effect that a State might not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. In the case of a national having an effective link with one State and a weak link with another, the *Nottebohm* case should be followed for guidance, reliance being placed on the effective link.

17. In the case of diplomatic protection for a national with dual nationality against a third State whose nationality he did not possess, there should be proof of an effective link between him or her and the State claiming to exercise protection, without compromising the general principle that any State of which a dual or multiple national was a national could afford the national diplomatic protection in respect of a claim of injury arising in another State of which he or she was not a national. The same principle should apply in cases of joint protection by two or more States of a national injured in another State.

18. In view of human rights principles and current developments relating to the status of stateless persons,

it should be possible for a State in which such a person resided to give him or her diplomatic protection in a third State. The same principle should apply to a refugee lawfully resident in any State, provided the State of which he was a national declined to take action on his behalf. Draft article 8 would give States a discretionary right in respect of stateless persons and refugees, without imposing any obligation on them.

19. **Mr. Burri** (Observer for Switzerland) said that States had discretionary power in the exercise of diplomatic protection; international law did not give individuals the right to such protection, although domestic law might do so. However, draft article 4 stated that unless the injured person was able to bring a claim before a competent international court or tribunal, the State of nationality had a legal duty to exercise diplomatic protection upon request. That proposal, which reflected developments in international law, deserved further consideration.

20. It was open to question whether the use of force was legitimate even in the cases provided for in draft article 2. However, the issue was irrelevant, since the threat or use of force was not an instrument of diplomatic protection, which, as a form of peaceful settlement of disputes, prohibited any such action.

21. He took it that the provisions of draft article 5 would not affect States' right to establish their own conditions for the granting of nationality and that States would exercise diplomatic protection only on behalf of their own nationals as defined under internal legislation. Moreover, the term "bona fide" was too vague and might conflict with the concept of an effective link between the individual and the State of nationality; the result might be to leave an injured person without diplomatic protection if the State with which he had an effective link was one whose nationality he was deemed to have acquired in bad faith. Further information on the matter would be useful.

22. Draft article 6 was unacceptable: regardless of the existence of an effective link between the individual and the State, no State would willingly grant another the right to intervene in its affairs on behalf of an individual whom it considered one of its own nationals. However, dual nationals should be entitled to consular protection from one State of nationality against another State of nationality under certain circumstances, such as cases of serious, repeated violations of the fundamental principles of international law.

23. Draft article 7 was also problematic; dual or multiple nationals should not be entitled to diplomatic protection against third States unless they had an effective link with the State exercising such protection. There was no reason to abandon the principle, established in the *Nottebohm* case, that the claimant's nationality must be opposable to the respondent State. Thus, it would be impossible for two or more States of nationality to jointly exercise diplomatic protection.

24. While he understood the justification for the mention of stateless persons and refugees in draft article 8, the host country's intervention should be limited to consular protection.

25. Lastly, he looked forward to the results of the Commission's deliberations on the exercise of diplomatic protection on behalf of legal persons and on the exhaustion of domestic remedies.

26. **Mr. Baena Soares** (Brazil), speaking on the topic of diplomatic protection, said that in accordance with Article 2 of the Charter of the United Nations and subject to the exception mentioned in Article 51 thereof, the use or threat of force should be prohibited in all cases. He welcomed the growing consensus on that issue. The draft articles should cover only natural persons, not legal persons. Furthermore, the exercise of diplomatic protection should remain a discretionary right of States.

27. Turning to the draft articles on unilateral acts of States, he stressed the need to establish which persons were authorized to formulate such acts. Authorization should be limited to heads of State and Government, Ministers for Foreign Affairs and, where State practice so dictated, other authorized persons; however, caution must be exercised in order to prevent multiple and conflicting declarations from being made by officials at different levels of a single State's Government.

28. **Mr. Yamada** (Chairman of the International Law Commission) introduced Chapters VII, VIII and IX of the report of the International Law Commission on the work of its fifty-second session (A/55/10).

29. With regard to Chapter VII, on reservations to treaties, the Commission had considered the report of the Special Rapporteur, Mr. Alain Pellet (A/CN.4/508 and Adds. 1-4) and had adopted five draft guidelines

with commentary, which completed the first chapter of the draft Guide to Practice.

30. Draft guideline 1.1.8 established that unilateral statements made under exclusionary or opting-out provisions of a treaty constituted reservations. The issue was controversial; the International Labour Organization (ILO) strongly opposed that interpretation, which was not reflected in the Vienna Convention on the Law of Treaties and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. However, those Conventions did not preclude the formulation of reservations on the basis of specific treaty provisions. Moreover, a number of ILO conventions provided for the possibility of unilateral statements in connection with exclusionary clauses; such statements corresponded exactly to the definition of reservations and need not be subject to a separate legal regime. While it was true that some conventions contained both exclusionary and reservation clauses, that was merely due to the vagueness of terms.

31. The case was analogous to that covered by article 17, paragraph 1, of the 1969 and 1986 Vienna Conventions, which dealt with the consent of States to be bound by part of a treaty; moreover, some treaties allowed the Parties to exclude, by unilateral statement, the legal effect of certain provisions even after the instrument had entered into force. Such statements were not reservations since they did not place conditions on the accession of the Party that made them; they were closer to partial denunciations and could be linked to Part V of the 1969 and 1986 Vienna Conventions concerning invalidity, termination and suspension of the operation of treaties.

32. Draft guideline 1.4.6 stipulated that unilateral statements made under an optional clause, which differed from statements made under an exclusionary clause, were not reservations and thus lay outside the scope of the draft Guide. Statements made under optional clauses had the effect of increasing the declarant's obligations beyond what was normally expected of parties to the treaty and did not affect its entry into force for other parties. Such clauses typically involved acceptance of a certain mode of dispute settlement or of monitoring by a treaty body. The statements in question differed from those covered by draft guideline 1.4.1 only in that they were formulated under a treaty rather than on the author's initiative. However, the Commission had considered the provision useful because such statements were the counterparts of those made under exclusionary clauses.

33. The second paragraph dealt with restrictions or conditions that frequently accompanied the statements covered by the draft guideline. Such conditions could not be equated with the restrictions contained in unilateral statements made under optional clauses in the context of reservations to a multilateral treaty; while it was true that the objective of such restrictions or conditions was to limit the legal effect of a treaty's provision, they did not in themselves constitute unilateral statements.

34. Draft guideline 1.4.7, which established that unilateral statements providing for a choice between the provisions of a treaty, did not constitute reservations and lay outside the scope of the draft Guide, reflected the latter's pedagogical nature. Article 17, paragraph 2, of the 1969 and 1986 Vienna Conventions dealt with treaties that permitted a choice between differing provisions, a common practice illustrated by numerous Council of Europe and ILO treaties. Such provisions should not be equated with the optional clauses referred to in draft guideline 1.4.6 since the statements which they invited parties to formulate were binding and required for entry into force of the treaty. The draft guideline also covered treaty clauses that obliged parties to choose between provisions, a less common practice found primarily in ILO conventions. Although such alternative commitments resembled reservations in many respects, they differed in that the conditions for the author's participation and the exclusion envisaged were provided for in the treaty itself.

35. Section 1.7 of the draft guidelines embodied the Commission's view that since reservations were not the only way in which parties to a treaty could exclude or modify the legal effect of certain of its provisions or of certain aspects of the instrument as a whole, it would be useful to link the definition of reservations and interpretive declarations to that of other procedures with the same objective.

36. Draft guideline 1.7.1 addressed the issue of procedures involving the insertion into a treaty of restrictive clauses, escape clauses, derogations or bilateralization procedures purporting to limit its scope or application or the conclusion of an agreement, under a specific provision of a treaty, by which two or more parties purported to exclude or modify the legal effect

of certain of its provisions as between themselves. Other techniques included suspension of the treaty and amendments which were not automatically binding on all parties; such procedures could take place even after the instrument's entry into force. Since they had sometimes been erroneously referred to as reservations, the Commission had considered it useful to clarify the matter in the draft Guide. Bilateralization, for its part, allowed States parties to a multilateral convention to choose the partners with which they would implement the regime provided for therein.

37. Draft guideline 1.7.2 covered alternative procedures by which parties could specify or clarify the meaning or scope of a treaty's provisions through the insertion of provisions purporting to interpret the instrument or the conclusion of a supplementary agreement for that purpose. Since such procedures were always treaty-based, they were valid alternatives to conditional interpretive declarations.

38. The second part of the Special Rapporteur's fifth report (A/CN.4/508/Add. 3 and 4) dealt mainly with the formulation of reservations and interpretive declarations. The key issues addressed were those of the moment and the modalities of formulation.

39. Draft guidelines 2.2.1 and 2.2.2 dealt with reservations formulated when signing the treaty or when negotiating, adopting or authenticating the treaty. The Special Rapporteur was of the view that such reservations must be formally confirmed by the reserving State or international organization when expressing its consent to be bound by the treaty.

40. Draft guideline 2.2.3 stated that reservations formulated when signing an agreement in simplified form did not require any subsequent confirmation. In the Special Rapporteur's view, that was a logical consequence of the nature of the agreement. On the other hand, if a treaty provided that a reservation might be made upon signing, the reservation did not have to be confirmed at the time of expression of consent to be bound, and that was a substance of draft guideline 2.2.4.

41. With regard to the difficult problem of late reservations, the Special Rapporteur proposed in draft guideline 2.3.2 that in effect late reservations might be deemed unanimously accepted if no objection had been made by any contracting party within a 12-month period following the date on which notification was received. If, however, an objection had been made, under guideline 2.3.3 the treaty should enter into or remain in force in respect of the reserving State or international organization without the reservation being made.

42. The report also addressed several issues pertaining to the formulation of interpretive declarations and conditional interpretive declarations. Those issues would be considered at the next session of the Commission.

43. The Commission would welcome any comments or observations on the draft guidelines, including those it had not yet discussed, and any additional answers to the questionnaires circulated to States on the topic of reservations to treaties.

44. Chapter VIII of the Commission's report dealt with international liability for injurious consequences arising out of acts not prohibited by international law. In his third report (A/CN.4/510), the Special Rapporteur on prevention of transboundary damage from hazardous activities presented a draft preamble and a revised set of draft articles with the recommendation that they should be adopted as a framework convention. He said that the draft articles essentially constituted progressive development on the topic and sought to evolve procedures enabling States to act in a concerted manner on the issue of prevention.

45. Most of the changes to the draft articles had been introduced as a result of suggestions formulated by States. New articles 16 and 17 on measures of preparedness were based on similar provisions in the Convention on the Law of Non-Navigational Uses of International Watercourses. Other issues addressed in the third report included the scope of the topic, the relationship between prevention and liability, the relationship between the duty of prevention and an equitable balance of interests among States and the duality of the regimes of liability and State responsibility. The report raised the issue of whether the subtopic of hazardous activities should continue to be addressed within the broader category of acts not prohibited by international law.

46. The paragraphs of the draft preamble reflected concerns expressed by States regarding the right to development, a balanced approach to dealing with the environment and development, the importance of international cooperation and limits on the freedom of States.

47. In the debate on the third report, most Commission members had held the view that with a few drafting changes the articles would be ready for adoption. They had seen the draft articles as a self-contained set of primary rules on risk management or prevention, which would not prejudice any higher standards and more specific obligations under other environmental treaties.

48. The point had been raised that a reference to the duty of due diligence might imply that the draft articles would not apply to intentional or reckless conduct and might create confusion with issues of State responsibility. The Special Rapporteur had responded that the element of *dolus* or the intention or legality of the activity was not relevant to the purposes of the draft articles; the articles were intended to cover all activities that risked causing transboundary harm, including military activities, assuming that they were fully permissible under international law.

49. With regard to the draft preamble, support had been expressed for including references to positive international law, since there existed a series of conventions that had a direct bearing on the subject matter. On the possible deletion of the words "acts not prohibited by international law", opinion had been divided. It had been noted that deletion might require a review of the entire text, broaden the scope of the draft articles, weaken the notion of prohibition, blur the legal distinction between the topics of State responsibility and international liability and seem to legitimize prohibited activities. Others had stated that deleting the phrase would not require a review of the entire set of draft articles, and that in the case of an illegal activity State responsibility would apply; the focus of the Commission's work on the topic was the content of prevention and not the nature of the various activities. The Special Rapporteur had responded that, irrespective of the retention or deletion of the phrase, the main value of the draft was the emphasis placed on the obligation to consult at the earliest possible stage.

50. The Commission had concurred that the draft articles should be adopted as a framework convention and had referred the draft preamble and the revised draft articles to the Drafting Committee. The Commission would welcome any comments by Governments on the draft provisions.

51. Chapter IX of the report dealt with other decisions and conclusions of the Commission, including its long-term programme of work. The Working Group established to look into the matter had presented a set of proposed new topics, of which five had been chosen: responsibility of international organizations; effects of armed conflicts on treaties; shared natural resources of States; expulsion of aliens; and risks ensuing from fragmentation of international law. For each of the topics a syllabus was annexed to the report of the Commission. In selecting the five topics, the Commission and its Working Group had been guided by criteria related to the utility and practicality of the topics and their codification.

52. Although the topic of the risk ensuing from fragmentation would not result in codification in the normal sense, the Commission felt that the topic involved increasingly important issues on which it could make a contribution and that it was well within the Commission's competence and in accordance with its statute.

53. With regard to the length and duration of future sessions, the Commission had concluded that split sessions were more effective. With a split session, normally its work could be completed in less than 12 weeks per year. It saw good reason for reverting to the older practice of a total annual provision of 10 weeks per year, with a possibility of extension to 12 weeks in particular years as required. The Commission felt that its work requirements made it essential to hold a 12-week split session the following year at the United Nations Office in Geneva. Thereafter, in the initial years of the quinquennium, the total length of the session should be 10 weeks per year and during the final years, 12 weeks. Normally the Commission would continue to meet in Geneva. However, in order to enhance the relationship between the Commission and the Sixth Committee, one or two of its half sessions might be held in New York towards the middle of the next quinquennium.

54. The Commission was very aware of the General Assembly's request that it implement cost-saving arrangements. Because of the heavy workload in the past year, the Commission had not been able to achieve much in the way of cost reduction, but it had worked diligently and had used 95 per cent of the allocated conference facilities. Average attendance had been 73.88 per cent, an improvement over the previous year.

55. As in the past, the Commission had cooperated with other bodies, including the Inter-American

Juridical Committee, the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation and the Committee on Legal Advisers on Public International Law. Judge Gilbert Guillaume, President of the International Court of Justice, had given an address to the Commission, followed by an exchange of views. The Commission members had also had an informal exchange of views with members of the legal services of the International Committee of the Red Cross on topics of mutual interest.

56. The thirty-sixth session of the International Law Seminar had been held at the Palais des Nations with 24 participants of different nationalities, mostly from developing countries. The participants had observed plenary meetings of the Commission and attended lectures especially arranged for them. Of the 807 participants, representing 147 nationalities, who had taken part in the Seminar since its inception in 1965, 461 had received a fellowship. The Seminar enabled young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the other international organizations with headquarters in Geneva. The Commission wished to express gratitude to those Governments that had made contributions to the Seminar and urged them to continue to do so. The organizers of the Seminar had had to draw on the reserve of the Fund for the present year. Should the situation continue, funds might not allow for the same number of fellowships to be awarded in the future.

57. Thanks to generous contributions from the Government of Brazil, the Commission had held the fifteenth Memorial Lecture in honour of Gilberto Amado. Professor Alain Pellet from the University of Paris X-Nanterre and member of the Commission had spoken on the subject of "'Human rightism' and international law".

58. **Mr. Hilger** (Germany), speaking on reservations to treaties, said that his Government could accept the five new draft guidelines adopted by the Commission on first reading, as it had supported the previous guidelines adopted on first reading. Clearly much thoughtful legal analysis on the definitions of reservations and interpretive declarations had gone into the report and the Commission's debate. However, his delegation would like to renew its appeal to the Commission to concentrate on finding practical solutions to real life problems.

59. His delegation welcomed the new draft guidelines on alternatives to reservations. Like reservations, alternative procedures could protect the integrity of the object and purpose of a treaty while at the same time allowing a maximum number of States to become parties, even when not all of them were able to assume full treaty obligations. Such alternative procedures as contracting-out and contracting-in clauses, restrictive clauses, escape clauses, saving clauses and derogation clauses could serve the same purpose as reservations while avoiding their drawbacks.

60. It was to be hoped that the Commission's guidelines would cause States to attach greater importance to alternatives to reservations. It was in the negotiating phase that creative solutions should be found and incorporated into the text of multilateral treaties in order to avoid reservations with their often negative consequences. That would be possible only if States participating in convention conferences did not leave the question of reservations and alternatives until the end, when time pressure would result either in no provision on reservations or a mere restatement of the rule that reservations must be compatible with the object and purpose of the treaty.

61. In the second part of his fifth report (A/CN.4/508/Add. 3 and 4), not yet debated in the Commission, the Special Rapporteur dealt with problems of late reservations, in other words, reservations formulated by States after they had expressed their consent to be bound by a treaty. His delegation agreed that it might undermine the principle of *pacta sunt servanda* if objections to late reservations had the same limited effect as objections to timely reservations. Late reservations could be accepted only if all other parties to the treaty gave their unanimous, if only tacit, consent. A single objection to a late reservation prevented it from producing its effects.

62. Since the Secretary-General of the United Nations was the most important depositary of multilateral treaties, his delegation welcomed the recent decision to extend the 90-day period for objections to late reservations to 12 months. The extended time period enabled Governments to analyse and assess late reservations and allowed for dialogue between the formulating State and the other contracting parties.

63. Also welcome was the new practice of the Treaty Section of the United Nations to distribute depositary

notifications electronically, thereby putting an end to the serious problems caused by long delays.

64. Despite those practical solutions, however, there was a matter of principle that related to the draft articles on reservations to treaties. Whatever the deadline for objections to late reservations, it could not be counted from the date appearing on the notification. It was the responsibility of the sender to effect receipt of the letter or note by the addressee, and the period should run from the date of receipt.

65. The problems associated with late reservations had recently acquired practical importance in the case of so-called modifications of reservations. The Special Rapporteur seemed to hold the view that a modification of a reservation in most cases constituted a diluted form of withdrawal or partial withdrawal. Clearly, modifications of reservations were permissible and even welcome if they constituted a partial withdrawal of reservations. In such cases other contracting parties could not object. It would be regrettable if the United Nations Treaty Section were to circulate such welcome modifications of reservations with an invitation to object. The result might be that an ill-founded objection by a single State might render the partial withdrawal of the reservation null and void.

66. Problems arose, however, when the modification of a reservation not only subtracted from the original reservation but changed its nature or scope by adding something to it. In that case, the modification of a reservation would actually constitute a new late reservation, for which the tacit unanimous consent of all contracting parties, in other words, the total absence of objections within one year from the date of receipt of the depositary notification, would be required for acceptance.

67. A recent case would illustrate some of the problems that could arise in the handling of modifications of reservations. The previous year, the Permanent Mission of Germany to the United Nations had received a notification of a modification of a reservation to the Convention on the Elimination of All Forms of Discrimination against Women just two weeks short of the 90-day deadline for objections. Examination had revealed that it constituted not a partial withdrawal but a new late reservation necessitating consultation with other contracting parties. Although the objection had been filed within 90 days of receipt of notification, the depositary listed the modification of the reservation as accepted by all States and the German objection as a mere communication, a term used for late objections. That example demonstrated the need for continued dialogue with the Office of Legal Affairs of the United Nations and particularly its Treaty Section on the handling of past and present modifications of reservations.

68. It might also be helpful to consider the reintroduction to the Committee's agenda of a topic entitled "Practice of the Secretary-General as depositary of multilateral treaties", which would foster a better understanding on all sides of the complexities of the issue. The discussion might be based on an updated edition of the summary of practice of the Secretary-General as depositary of multilateral treaties (ST/LEG/SER.D/7/Rev.1), on which the Secretariat had reportedly been working for some time. He also reiterated his delegation's appeal to the Commission and the Special Rapporteur to concentrate on the question of inadmissible reservations — their practical effects and consequences — on which the Commission's help would be more useful than in the rather academic area of definitions.

69. With regard to the topic of international liability for injurious consequences of acts not prohibited by international law, he said that the draft preamble and revised articles constituted an appropriate basis for discussion. As they stood, they provided for a reasonable balance of both the economic interests of States of origin and the interests of States likely to be affected. Prevention should be the key principle of the draft articles, which ought to contain clear references to international law. His delegation supported the deletion of the phrase "not prohibited by international law" in article 1, since the rules of State responsibility would apply in the case of illegal activity.

70. **Mr. Tanzi** (Italy), speaking on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, a topic to which his delegation attached particular importance, said that, in joining the consensus that the Commission should first deal with prevention and later with the consequences of harm, his delegation — in common with many others — had not thought that the Commission's task would be completed without a treatment of liability proper. He would therefore make only preliminary remarks on the draft articles.

71. As his delegation had suggested previously, the draft articles should cover not only significant transboundary harm but also harm caused in areas outside national jurisdiction. Draft article 1 — and, where required by drafting consistency, other articles, especially article 3 — should be amended to that effect, bringing the draft articles into line with the authoritative assessment by the International Court of Justice that the general principle of prevention of environmental harm applied specifically to regions over which no State had sovereignty. Concerns over the protection of the ecosystems pertaining to the relevant environments should be reflected in the draft, in either article 1 or article 2. The same articles should contain an explicit reference to both public and private sector activities, even though only States would be accountable for their compliance with the draft articles. As for the phrase "not prohibited by international law", his delegation preferred, on balance, that it should be retained, considering the wide range of implications involved.

72. His delegation shared the widespread concern at the exclusion of creeping pollution from the scope of the draft articles. One of the main features of a sound environmental impact assessment was the period of time involved, in combination with other sources. Significant transboundary harm resulting over a period of time should thus be subject to the obligation of prevention. The reasonableness of that obligation, however, depended on its being an obligation of conduct and not of result.

73. Turning to the relationship between the topic under discussion and State responsibility, he said that the former concerned a primary substantive obligation — that of prevention of significant harm — complemented by a host of procedural rules, the breach of which would entail international responsibility. Draft article 3, however, codified the customary no-harm rule as a due diligence obligation. In other words, the mere occurrence of harm would not entail responsibility; "negligent harm" would be required for there to be wrongfulness. To argue that non-fulfilment of the due diligence obligation of prevention did not imply unlawfulness, however, was tantamount to nullifying the whole endeavour, particularly in view of the efforts to calibrate the obligation of prevention in due diligence terms, which had been the result not of juridical sophistication but of a difficult political compromise that had been hammered out over the years.

74. The State liability regime would, in his delegation's view, involve another set of primary obligations — mostly of a due diligence nature — arising out of the occurrence of harm, despite the fact that due diligence had been observed or when the lack of it could not be established. The regime should involve State-to-State compensation only in subsidiary terms, since the financial side should be tackled primarily through the internalization of the civil liability of the operators concerned and compulsory insurance. There was a need for a differentiated application of the due diligence obligation proportional to the economic and technological development of the States concerned. Accordingly, in order to enhance and harmonize the prevention capacity of individual States, the provisions on cooperation and implementation in draft articles 4 and 5 should be further articulated and provide for more stringent rules.

75. The improvements to draft article 6 were welcome. Article 7, however, on environmental impact assessment, required further elaboration. Confining the requirements of such an assessment to activities subject to the authorization regime seemed of limited use. Since, under article 6, such activities fell within the scope of the draft articles, it would be almost impossible to assess whether or not a given activity involved a risk of causing significant transboundary harm, as some Governments had pointed out in their written comments. The Commission should also consider providing guidance to national legislators on criteria for making an environmental impact assessment, drawing on existing conventional practice, especially as developed at the multilateral level in the framework of the United Nations/Economic Commission for Europe process. Such assessment was one of the factors for the determination of "all appropriate measures" making up the due diligence standard of prevention, but the Commission should consider mentioning other elements of international practice, such as the best available technology, the best environmental practices, the "polluter pays" principle (in preventive terms) and the precautionary principle. Indeed, the last two principles had been recommended for inclusion in the latest long-term programme of work for the Commission.

76. As for the procedural aspect of the draft articles, the changes in the new versions of articles 9, 10 and 12

were welcome, all the more so since the draft articles did not provide for compulsory institutional cooperation. His delegation, concurring that the general obligations of cooperation and consultation did not entail a right of veto on planned activities by the potentially affected State, found the provisions proposed by the Commission realistic and well balanced, although they could be further refined. Failure by the State of origin to abide by the obligations in question would, however, amount to a breach of the due diligence obligation of prevention.

77. It would be essential for States to cooperate on the consequences of harm that had occurred despite the taking of all appropriate measures. The latter phrase should not, however, be taken to imply that any harm was negotiable. Areas outside national jurisdiction also fell within the scope of the draft articles. In the *Gabcikovo-Nagymaros* ruling, the International Court of Justice had upheld the argument that general rules and standards of environmental law constrained the wide contractual freedom of the States most directly concerned with the risk of serious transboundary harm.

78. Although, as he had said, the Commission should not consider its task complete until it had dealt with liability proper, the draft articles would, when appropriately refined, represent a significant achievement in the field of risk management. His delegation would therefore be willing to consider the adoption of a separate instrument on prevention, on the understanding that it would form the basis for the continuation of the Commission's work on the topic.

79. **Mr. Pérez Giralda** (Spain) had only one comment to make on Part One of the fifth report on reservations to treaties (A/CN.4/508 and Add.1 and 2), which his delegation found highly commendable: the commentary to draft guideline 1.7.1 should, to avoid confusion, contain a reference to the practices of "opting out" and "opting in", which were especially common under European Community law. For example, the Protocol on social policy required Governments to opt out, while that relating to the participation by some States in the third phase of economic and monetary union required them to opt in.

80. In response to the Commission's request in paragraph 26 for any comments by Governments on the draft guidelines concerning formulation of reservations and interpretative declarations, which the Commission had regrettably lacked time to consider, he said that the late formulation of reservations was an extremely delicate issue, involving as it did security and confidence in treaty relations between States. It was therefore no surprise that draft guideline 2.3.1 (Reservations formulated late), which aimed to reflect both article 19 of the Vienna Convention on the Law of Treaties and the undeniable fact that States parties to an international treaty could adjust their obligations they liked, so long as they did so by agreement, had been difficult to formulate. Nonetheless, the use of a double negative did not bring the necessary transparency to the clearly exceptional nature that late reservations ought to have.

81. Indeed, one half of the guidelines seemed to contradict the other. If a State might not "formulate a reservation to a treaty after expressing its consent to be bound by the treaty", the only exception should be a late reservation by a State once it had obtained the unanimous consent of the other parties to the treaty, and not before. The late reservation would therefore become an amendment to the treaty. In practice, however, as the Special Rapporteur's report recognized, late reservations were made without prior agreement and could be explicitly or tacitly accepted by the other parties to the treaty. Such exceptions, although they existed, should not be formally recognized in a guideline. In view of the importance of emphasizing the exceptional nature of a late reservation, therefore, his delegation agreed with the Special Rapporteur that such late reservations made after the expression of consent to be bound could stand only if the agreement of all the States parties was obtained. Otherwise, a single State, even in its bilateral relations with others which did not object to its reservation, could, arbitrarily and at any moment, make changes to obligations that it had assumed.

82. Paragraph 320 *ff.* of the fifth report on reservations to treaties discussed a recent change announced by the Secretary-General in the time limit for objecting to treaties, from 90 days to 12 months. The change, which his delegation supported, had come about in the context of a broader discussion on the effects not only of late reservations but of amendments to reservations, which the Special Rapporteur would presumably deal with at some future point. In that regard, his delegation considered that, by contrast with the situation relating to late reservations, which always involved the exclusion or modification of obligations assumed by the State formulating them, the

modification of a reservation could involve either the addition of new restrictions or partial withdrawal or a toning down of some of the restrictions initially contained in the reservation. In the first case, there was no difficulty in accepting the unanimity principle, as in the case of late reservations. Changes of the second kind, however, which added to a State's obligations, should not be governed by the same principle. Objections to such reservations should affect only the State formulating them and a State objecting to them. The others could thus continue their treaty relations with the former in a way which more fully observed the purposes of the treaty. Otherwise, as often happened in practice, full compliance with a treaty could be damaged by an objection by a single State party.

83. Lastly, it made little sense for the title of draft guideline 1.5.1 to contain the word "reservations", albeit in quotation marks, when it was clear from the guideline itself that such a unilateral statement did not constitute a reservation.

84. With regard to the draft articles on prevention of transboundary damage from hazardous activities, his delegation considered that the Commission had generally adopted the right approach. Codifying the content and scope of the duty of prevention, however, gave rise to problems as complex as those relating to international liability for injurious consequences arising out of acts not prohibited by international law, the codification of which had been postponed. It was therefore necessary to bear in mind the necessary links between the two issues, in the awareness that decisions taken on prevention would have a bearing on the treatment of the issue of liability.

85. The Commission had been right to extend the concept of "harm" to the environment, as expressed in draft article 2 (b), but it was regrettable that the definition of "transboundary harm" was still restricted, inasmuch as draft article 2 (d) specified "the State in the territory or otherwise under the jurisdiction or control of which ...". That would clearly exclude any environmental harm caused in areas situated away from the national jurisdiction — so-called "global commons" — even though including such areas in transboundary harm had been generally recognized in its national law and practice. Principle 21 of the Stockholm Declaration of 1972 — and subsequently the World Charter for Nature and the Rio Declaration on Environment and Development — clearly stated that States were obliged to avoid harm to areas outside their national jurisdiction.

86. Moreover, numerous international agreements to protect the environment as a whole, without distinction of national territories, were aimed at protecting the sea, space or Antarctica. Of particular relevance were the United Nations Convention on the Law of the Sea and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. The International Court of Justice had also given a broader meaning to the principle when ruling on the lawfulness of the threat or use of nuclear weapons.

87. His delegation therefore concurred with others that the draft articles should be given a broader scope; draft article 18 was not sufficient to allay its concerns. The regulation of liability should consider the special situation of environmental harm caused far away from a national jurisdiction. Indeed the draft articles should not only incorporate the achievements of environmental law but should consider the possibility of marrying them with the Commission's proposals regarding State responsibility, the draft articles of which provided for a greater degree of liability for serious violations of obligations to the international community as a whole.

88. **Mr. Lavalle-Valdés** (Guatemala), referring to the draft guidelines on reservations to treaties, said that guideline 1.4.7 dealt with cases in which a State was required to choose between two or more provisions of a treaty, but did not refer to cases in which a State simply had the option of making such a choice. A case in point was the United Nations Convention on the Law of the Sea, which allowed States to choose among different modalities of dispute settlement, stipulating that if such a choice was not made, binding arbitration would apply. He therefore proposed that the phrase "or permits them to make such a choice" should be inserted in the third line of the guideline, after "provisions of the treaty,".

89. Turning to the draft preamble and revised draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he drew attention to the phrase "activities not prohibited by international law" in article 1. That was a key phrase, since it ruled out unlawful activities even if they were accompanied by preventive measures intended to minimize risk or actual harm. He suggested, however, that "activities" should be replaced by "any activity", in order to take into account the comments made by the United Kingdom in document A/CN.4/509.

90. With regard to draft article 2 (a), it was surprising that the word "significant" appeared both in the term to be defined and in its definition.

91. The idea expressed by the Commission in paragraph (12) of its commentary on draft article 3, namely, that States should be required to keep abreast of technological changes and scientific developments, should be incorporated into the draft article.

92. With regard to draft article 8, his delegation supported the United Kingdom proposal to expand it and the proposal by the Netherlands to insert the word "prior" before "authorization" (A/CN.4/509). In draft article 10, the question of whether or not the activity in question could be authorized prior to the conclusion of consultations should be clarified, as paragraph 2 bis implied that it could be, while paragraph 3 implied the opposite.

93. In the last line of draft article 14, the phrase "as much information as can be provided under the circumstances" should be replaced by "all data and information to the extent that circumstances permit".

94. With regard to draft article 15, his delegation supported the amendments proposed by the Netherlands in document A/CN.4/509. His delegation also proposed that the words "or have suffered such harm" should be inserted after "significant transboundary harm".

95. In draft article 16, the word "other" should be deleted. His delegation also proposed that consideration should be given to incorporating into the article paragraphs based on article 28, paragraphs 2, 3 and 4, of the Convention on the Law of the Non-Navigational Uses of International Watercourses.

96. With regard to draft article 19, it was important that the fact-finding commission referred to in paragraph 2 should also have conciliation powers, since there could be disputes other than those relating to the facts. Provisions concerning the composition of the commission should also be added to the draft article, based on article 33, paragraphs 5 to 9, of the Convention on the Law of the Non-Navigational Uses of International Watercourses.

97. Lastly, his delegation expressed its preference for a convention that would cover both the liability and the prevention aspects of the issue.

98. **Mr. Choung** Il Chee (Republic of Korea), referring to the draft guidelines on reservations to treaties, drew attention to guideline 1.3.3, which provided that a unilateral act "shall be presumed not to constitute a reservation except when it purports to exclude or modify the legal effect of certain provisions of the treaty or of the treaty as a whole". His understanding of the phrase that followed the word "except" was that when a unilateral statement was made with the intent to exclude or modify certain provisions of the treaty or the treaty as a whole, such a statement was not a mere interpretative declaration, but a reservation or conditional interpretative declaration having the same legal effect as a reservation.

99. When a treaty prohibited reservations to itself, States could still make a conditional interpretative declaration to the treaty, having the same legal effect as a reservation. In 1988 the European Court of Human Rights had ruled invalid an interpretative declaration made by Switzerland because it had conflicted with article 64 of the European Convention on Human Rights, which prohibited reservations. His delegation proposed that a statement along the following lines should be added to the draft guideline: "Conditional interpretative declarations to a treaty are invalid when a treaty prohibits reservations to itself". An arbitral tribunal or a court of law could eventually decide whether a unilateral statement amounted to a conditional interpretative declaration and a reservation, or remained merely an interpretative declaration.

100. Turning to the draft preamble and revised draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, he said that, while it had been suggested that the fifth preambular paragraph should be placed in the main body of the convention as an independent article, it should be kept in mind that, for the purposes of interpretation, a preambular clause had the same legal effect as the operative paragraphs of a treaty.

101. Draft article 2 (a) referred to two types of harm, "significant" and "disastrous". He would appreciate clarification as to whether those were two different types of harm or two different levels of the same type of harm.

102. Likewise, it was unclear whether the proposed monitoring mechanism in draft article 5 should be

developed on an individual or a multilateral basis; his delegation preferred the latter solution.

103. Since undertaking an environmental impact assessment was one of the most difficult components of the prevention of transboundary harm, he suggested that a set of time-frames should be added to draft article 7 to ensure the speedy implementation of a monitoring policy to prevent the risk of transboundary harm.

104. Lastly, he believed that the use of the phrase "acts not prohibited by international law" in the title of chapter VIII of the report was unfortunate. If any act of a State constituted a risk of causing damage to neighbouring States, such a risk should not be taken, in accordance with the 1996 advisory opinion of the International Court of Justice on the legality of the use by a State of nuclear weapons in armed conflict. The risk of transboundary atmospheric pollution was particularly serious. Since it was very difficult to prevent the movement of polluted air across State boundaries, such pollution must be controlled in its State of origin.

105. **Mr. Roth** (Sweden), speaking on behalf of the Nordic countries and referring to the topic of reservations to treaties, noted with regret that the Commission had been unable to give much consideration to the topic at its fifty-second session owing to time constraints.

106. What was new in the Special Rapporteur's fifth report on the topic was the analysis of alternatives to reservations and interpretative declarations and of the formulation, modulation and withdrawal of reservations and interpretative declarations.

107. The part of the report dealing with alternatives to reservations was intended to supplement the chapter on definitions. The Nordic countries supported the idea of mentioning such alternatives in the draft Guide to Practice. In that connection, the Nordic countries endorsed the Special Rapporteur's view that there was nothing wrong in reflecting State practice. Reservations and their alternatives were useful, as they might increase the number of States willing to become parties to a treaty. The main concern of the delegations on whose behalf he spoke was that States made reservations which were obviously incompatible with the object and purpose of the treaty or which left other States in doubt as to their scope.

108. The Nordic countries welcomed the treatment in the fifth report of the question of so-called late reservations. Late and modified reservations were not uncommon and sometimes posed problems for States. In principle, there were strict rules. Once the moment for making reservations had passed, it was not possible for a State to make a reservation or modify its reservation at a later stage. That principle might, however, be overridden by the unanimous or tacit consent of the other parties to a treaty.

109. In that connection, he noted that the Secretary-General had recently abandoned the practice of giving parties to a treaty a 90-day period in which to object to a modified reservation that had the character of a new reservation, as well as to reservations formulated after a State had established its consent to be bound by a treaty. The time limit had been extended to 12 months.

110. As noted in the report, the Special Rapporteur had dealt up to then with definitions and strictly procedural aspects of the formulation of reservations and interpretative declarations, and not with the consequences of an incorrect procedure. The Nordic countries hoped that the Special Rapporteur would soon proceed to that part of the topic, and they looked forward to his analysis concerning inadmissible reservations and objections to such reservations.

The meeting rose at 1.03 p.m.